No. 80204-1

SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR T. LANE, KENNETH GOROHOFF and WALTER L. WILLIAMS, individually and on behalf of the class of all persons similarly situated,
Respondents/Cross-Appellants,

vs.

THE CITY OF SEATTLE,
Respondent,

vs.

THE CITY OF SHORELINE, KING COUNTY, KING COUNTY FIRE DISTRICT NO. 2, KING COUNTY FIRE DISTRICT NO. 4 (a.k.a. Shoreline Fire Department), NORTH HIGHLINE FIRE DISTRICT NO. 11, KING COUNTY FIRE DISTRICT NO. 16 (a.k.a. Northshore Fire Department), and KING COUNTY FIRE DISTRICT NO. 20,
Respondents, and

THE CITY OF BURIEN and THE CITY OF LAKE FOREST PARK,
Appellants.

RESPONDENT THE CITY OF SEATTLE'S BRIEF IN RESPONSE TO BURIEN AND LAKE FOREST PARK

THOMAS A. CARR
Seattle City Attorney

Gregory C. Narver, WSBA #18127
Suzanne L. Smith, WSBA #26849
Assistant City Attorneys
Seattle City Attorney's Office
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

FOSTER PEPPER, PLLC

William H. Patton, WSBA #5771
Attorney at Law
Foster Pepper, PLLC
1111 Third Avenue, Ste. 3400
Seattle, Washington 98101-3299
(206) 447-7898

Attorneys for Respondent The City of Seattle

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

WASHINGTON STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

This case is about who should pay for fire hydrants. It flows directly from this Court's streetlight decision in *Okeson v. Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) ("*Okeson I*"). One year after – and because of – *Okeson I*, Seattle revamped the 100-year mechanism by which the Seattle water utility recovered the costs of fire hydrants. Seattle concluded that fire hydrants, like streetlights, operate for the public health and safety of the general public and, like streetlights, must under *Okeson I* be categorized as a governmental rather than a proprietary function. The trial court agreed.

Burien and Lake Forest Park, however, disagree. They contend that whether to have fire hydrants in their jurisdictions is not "within the discretion" of either city – or Seattle itself – as this Court found to be the case with streetlights. They assert that both a state administrative code requirement and a state statute mandating the enactment of the International Fire Code mean that fire hydrants are an unavoidable, regulatory obligation of the Seattle water system. Fire hydrants, in their view, must therefore be paid for by water ratepayers, just like any other licensing or regulatory requirement of the water system would be.

This Court therefore must determine whether or not Seattle and the trial court were correct in their interpretation of *Okeson I*.

II. ASSIGNMENTS OF ERROR

Seattle agrees that the assignments of error alleged by Burien and Lake Forest Park adequately encompass the basic question of who should pay for the costs of fire hydrants.[1]

III. STATEMENT OF THE CASE

A. Seattle provides water service within the city and to suburban jurisdictions

Seattle Public Utilities ("SPU"), a department of the City of Seattle ("Seattle"), operates a municipal water system that provides retail water service in Seattle and certain suburban jurisdictions. CP 21. From the inception of Seattle's water service in 1898 until January 1, 2005, Seattle included the cost of providing fire hydrant service in the general rates it charged to all retail water ratepayers. CP 905.

B. Seattle concluded that *Okeson I* is applicable to fire hydrants as well as streetlights

Until the *Okeson I* decision, Seattle's practice was in line with the position advocated here by Burien and Lake Forest Park – namely, that the cost of fire hydrants should be borne by SPU retail water ratepayers both within and outside Seattle. Seattle had argued in *Okeson I* that if the costs of streetlights were a general public health and safety function of

---

[1] Additional assignments of error expected to be alleged by plaintiffs will be addressed by Seattle in its response to plaintiffs' opening brief on their cross claims.

government rather than a utility function, then the cost of maintaining fire hydrants must also be a government function, yet the cost of hydrants had been paid by SPU water ratepayers for over 100 years without challenge.

In response, the Court stated that it was not addressing the question of fire hydrants, just streetlights. *Okeson I,* 150 Wn.2d at 551. Seattle nevertheless concluded that *Okeson I* mandated a change in the allocation of fire hydrant costs. Of particular significance to Seattle's conclusion was the Court's analysis of legislation that expressly authorized municipalities to incorporate the cost of streetlights into their electric rates.[2] The Court held that this statutory amendment had no effect:

> With the passage of Laws of 2002, ch. 102, the Washington Legislature allowed municipalities to incorporate the cost of streetlights within the general rate structure of their electric utilities. Despite this statutory amendment, the increased rate that City Light ratepayers pay for streetlight maintenance still constitutes an unlawful tax . . . Inclusion of streetlights within RCW 35.92.050 does not transform that service into a proprietary function. Streetlights are still provided for the welfare of the general public, at the discretion of the city and not individual ratepayers.

Okeson I, 150 Wn.2d at 557.[3]

---

[2] Laws of 2002, ch. 102, added the phrase "including streetlights as an integral utility service incorporated within general rates" to RCW 35.92.050.

[3] In a recent discussion of *Okeson I*, this Court restated its analysis. In *Okeson v. Seattle*, 159 Wn.2d 436, 150 P.3d 556 (2007) ("*Okeson III*"), the Court's plurality opinion. noted:

The same legislation that amended RCW 35.92.050 also – and with identical language – expressly authorized the incorporation of fire hydrant costs into water rates.[4] This Court's rejection of the statutory amendment concerning streetlights led Seattle to conclude that the legislative amendment regarding fire hydrant costs would likewise fail to "transform" a general fund responsibility into a proprietary function. In Seattle's view, this Court would consider fire hydrants, like streetlights, to be a general government function, and would consider charging water customers for hydrant expenses through general rates an unlawful tax on ratepayers.

Consequently, following preparation and receipt of a rate analysis of fire hydrants, the Seattle City Council enacted Ordinance 121676 in November 2004, making new hydrant rates effective on January 1, 2005. CP 2483-90. As a result of that ordinance, the cost of fire hydrants ceased to be embedded in water rates and, instead, was charged to the general

---

> Although the 2002 amendment specifically authorized city utilities to charge their ratepayers for streetlights, we concluded that City Light could not do so because: (a) providing streetlights is a general government function, (b) streetlight-related charges constituted taxes rather than fees because they were designed to raise general revenue rather than to pay for specific customer services, (c) there must be express statutory or constitutional authority for a local government to impose a tax, and (d) the 2002 amendment did not include such taxing authority.

Id., 159 Wn.2d at 449 n.4 (citing *Okeson I*, 150 Wn.2d at 557-58).

[4] Laws of 2002, ch. 102, added the phrase added the phrase "including fire hydrants as an integral utility service incorporated within general rates" to RCW 35.92.010.

government of Seattle and to the governments in the other areas where SPU provides retail water service and hydrants. CP 2483-90.[5] This change was made, and became effective, before plaintiffs initiated this action on March 1, 2005. Pursuant to Ordinance 121676, Seattle sought payment from the other jurisdictions in which SPU provides retail water service for the cost of the hydrants located in their respective jurisdictions.

C. The trial court affirmed Seattle's reading of *Okeson I*

In the initial summary judgment ruling in this case, the trial court in July 2006 held that providing fire hydrants is for the general benefit and welfare of the public, and is a governmental, rather than a proprietary utility function. CP 1932-35. The trial court determined that Seattle's change in charging for fire hydrant service was proper, but that SPU nonetheless owed water ratepayers refunds for fire hydrant costs going back to March 1, 2002. CP 1921-1922.

The trial court, however, was unwilling in that initial order to rule on the parallel responsibility of suburban jurisdictions to pay for the fire hydrant service supplied by SPU without having the relevant fire districts

---

[5] The Seattle Council also enacted Ordinance 121671 in November 2004, which increased the utility tax applied to SPU's water system from 10 percent to 14.04 percent. CP 1722-24.

before the court at the same time.[6] The trial court therefore directed Seattle to bring the fire districts into the case as additional third party defendants so that their position could be heard in a consolidated schedule for briefing and argument. CP 1942-43.

Subsequently, in its March 2007 summary judgment ruling, the trial court agreed with Seattle's position and ruled that the general governments, rather than the fire districts, are required to pay for fire hydrant service in their jurisdictions. CP 3839, 3965-3967.[7] The trial court ultimately ordered Burien and Lake Forest Park to pay SPU for the cost of fire hydrants located within Burien and Lake Forest Park, respectively, going back to March 1, 2002. CP 3839, 4188.

D. Payment for fire hydrant costs in Burien and Lake Forest Park is on hold pending this Court's ruling

Since 2005, SPU has billed Seattle's general fund for hydrants located in Seattle, the City of Burien for hydrants in Burien, and the City of Lake Forest Park for hydrants in Lake Forest Park. CP 1584, pp. 82:2 –

---

[6] Burien and Lake Forest Park had argued that if a government entity, rather than water ratepayers, should pay for hydrants, it should be the fire districts, not those cities that had delegated fire fighting responsibilities to a fire district.

[7] Seattle's claim for payment from the City of Shoreline and from King County (for the cost of hydrants in unincorporated King County) was dismissed by the trial court on summary judgment. CP 3839. The court decided that those two jurisdictions were immune from the responsibility for paying for SPU fire hydrants because of an indemnity provision in each of the franchise agreements between SPU and those jurisdictions. CP 4119-21.

83:4. Although Seattle's general fund has paid SPU the amount billed, no payments have been received from Burien or Lake Forest Park.

Because of the pendency of this appeal, SPU has not been paid (by Seattle's general fund, by Burien or by Lake Forest Park) for retroactive hydrant costs for the period March 2002 through December 2004. If the trial court's decision is affirmed, Seattle's general fund will pay the SPU water fund the cost of Seattle's hydrants for this time period, plus interest, and SPU will provide a refund to all its retail water ratepayers. CP 2371-72, 4186-87. The Cities of Burien and Lake Forest Park similarly will be required to pay the SPU water fund for the cost of fire hydrants in their respective jurisdictions from March 1, 2002 forward. CP 4188.[8]

E. If the Court reverses, SPU will simply return to its past allocation of fire hydrant costs

Burien and Lake Forest Park have urged this Court to reverse the trial court's decision and hold that fire hydrant costs are properly borne by water ratepayers. If this Court adopts their position, Seattle will simply return to its historical allocation of costs; Seattle water ratepayers will once again pay for Seattle's fire hydrants, and Burien and Lake Forest

---

[8] Burien and Lake Forest Park do not dispute the amount of the payments that would be due if the trial court's decision is affirmed. CP 4185.

Park water ratepayers will pay for fire hydrants located in their respective cities.

IV. ARGUMENT

A. If the trial court's ruling that fire hydrant service is a government function is affirmed, Burien and Lake Forest Park must pay SPU for fire hydrants in their respective jurisdictions

1. Burien and Lake Forest Park are the general governments analogous to Seattle

If Seattle is the general government entity responsible for fire hydrant service within Seattle, then there must be analogous general government entities outside Seattle responsible for paying for fire hydrants in the suburban jurisdictions served by SPU's water system. The Cities of Burien and Lake Forest Park are those analogous general government entities.

To make SPU's Seattle water customers pay for hydrants in Burien and Lake Forest Park would be directly contrary to the trial court's core ruling that paying for fire hydrants is a general government responsibility. If the general governments in those jurisdictions do not pay for the hydrants, the Seattle ratepayers of SPU's water system – by default – will pay for them.[9]

---

[9] Neither Burien nor Lake Forest Park has argued that Seattle's general fund should pay for fire hydrants supplied by SPU in another city.

2. Payment from Burien and Lake Forest Park to SPU's water fund for hydrant costs is not a municipal tax

Contrary to Burien's and Lake Forest Park's contentions, their payments to SPU for hydrant costs would not constitute an unconstitutional tax on another municipality. Not every payment from one municipality to another is a tax. *King County Fire Prot. Dists. No. 16, No. 36, & No. 40 v. Housing Auth. of King County,* 123 Wn.2d 819, 833, 872 P.2d 516 (1994). Such payments are taxes only if they are imposed to raise money for the public treasury, not if they are payments related to a direct benefit or service. *Id.*; *Samis Land Co. v. City of Soap Lake,* 143 Wn.2d 798, 805, 23 P.3d 477 (2001). As this Court noted in *Samis*, such nontax payments by a governmental entity include utility customer fees. 143 Wn.2d at 805.

Turning the underlying logic of the *Okeson I* decision on its head, Burien and Lake Forest Park argue that fire hydrant payments by them to SPU would be unconstitutional taxes because the payments are not for utility service. But Burien and Lake Forest Park fail to understand why, under *Okeson I*, a utility service payment is precisely what they would be paying to SPU.

Both Burien and Lake Forest Park have enacted the International Fire Code, as required by RCW 19.27.031(3).[10] In doing so, they have established regulatory requirements for fire hydrants in their jurisdictions.[11] Since these regulatory requirements apply to SPU as a retail water supplier to these cities, Burien and Lake Forest Park have through regulation expressly required SPU to provide hydrants. SPU provides hydrants as a utility service to ratepayers, and in this case the customers of fire hydrant service are the Cities of Burien and Lake Forest Park. The trial court noted in its oral ruling this important distinction between individual ratepayers and City ratepayers:

> The Suburban Cities . . . argue that they are mere ratepayers and, pursuant to *Okeson*, any charge for service and maintenance of fire hydrants is an illegal tax. However, there is a significant distinction between the Cities . . . and individual ratepayers. Individual ratepayers are not obliged to provide water for fire protection services. Cities and counties are. And since they are so obliged, the service provided by SPU is a direct benefit to them since it allows them to meet this obligation. Accordingly, the charges imposed by SPU are not a tax but, rather, a fee

---

[10] The International Fire Code requires closer spacing of fire hydrants than minimal adherence to the Department of Health regulations in WAC 246-293-650. *See, e.g.*, Shoreline Ordinance No. 355, Section 5, table C105.1 (CP 1640), adopting the International Fire Code, with tables of fire hydrant distances that are closer than the 900 foot distance mandated by the WAC.

[11] Section 15.04.015 of Lake Forest Park's Municipal Code adopts the International Fire Code. Chapter 15.10 of Burien's Municipal Code does the same by adopting the Uniform Building Code. The Burien Municipal Code expressly requires fire hydrants to be installed by the water purveyor. Burien Municipal Code § 15.20.110.

> which, pursuant to RCW 43.09.210, the Cities and County must not only be properly billed but which they are also required to pay.

CP 4119.[12]

In addition, Burien and Lake Forest Park are simply incorrect in asserting that "Seattle has no authority to impose extra-territorial taxes." Burien's Brief at 28; Brief of Appellant Lake Forest Park ("Lake Forest Park's Brief") at 20. In fact, Seattle does impose a tax on its retail water sales outside the Seattle city limits. In *Burba v. City of Vancouver*, 113 Wn.2d 800, 783 P.2d 1056 (1989), this Court upheld a city's authority to impose a utility tax on gross revenue received from retail water customers outside its own city limits. Recently, in *Burns v. City of Seattle*, __Wn.2d __, 164 P.3d 475, 491 (August 2, 2007), this Court cited *Burba* for the principle that Seattle has the same authority to impose a utility tax on gross revenues generated from Seattle City Light's suburban, retail electric customers.

---

[12] Burien and Lake Forest Park have argued that the fire districts to which those cities have delegated fire fighting responsibilities should pay for the fire hydrants. The fire districts have submitted a brief to this Court on these issues, and Seattle will not address them here. Seattle will simply note that the fire districts have neither a contractual agreement with SPU to install fire hydrants, nor (unlike Burien and Lake Forest Park) have they enacted any code or other regulation that imposes a legal requirement on SPU to supply hydrants. In fact, fire districts are specifically not vested with authority to enforce city or county fire codes. RCW 52.12.031(6).

3. Seattle has stated a cause of action

Lake Forest Park argues that Seattle has failed to state a cause of action upon which relief can be granted. Lake Forest Park's Brief at 15. Yet the third party claim filed by Seattle against Burien and Lake Forest Park corresponds directly to the trial court's ruling. The trial court held that "it is the responsibility of the general government to provide for fire protection within its jurisdiction, including provision for the supply of water necessary for this purpose." CP 3963. This being the case, "it is the relevant local government's general fund which must bear the cost of providing this service." *Id.* In the absence of payment by Lake Forest Park it is SPU water customers that by default will absorb the costs of hydrants in that city, which the trial court ruled unlawful. This is precisely the basis upon which Seattle sought payment in its third party complaint from the other general government jurisdictions within SPU's retail service area. CP 686-88.[13]

---

[13] Both Burien and Lake Forest Park note the absence of a contract requiring them to pay SPU for hydrant service. Burien's Brief at 25; Lake Forest Park's Brief at 18. Seattle's claim against these cities is not based upon the existence of a specific contract, but on meeting those cities' own regulatory requirements.

B. Seattle will allocate fire hydrant costs in accordance with this Court's decision

This case follows from the actions taken by Seattle with respect to fire hydrants in response to *Okeson I*. Seattle will of course reverse those actions should this Court determine that the trial court's ruling on the governmental nature of fire hydrants was in error.

In prior briefing, Seattle acknowledged that the position advocated here by Burien and with Lake Forest Park – that the cost of hydrants should be borne by water ratepayers – has merit, as SPU is constrained by regulatory requirements to supply fire hydrants. CP 1674-77; Respondent The City of Seattle's Answer to Burien's Statement of Grounds for Direct Review at 3-6. Those arguments need not be repeated here.

At the same time, Seattle wishes to bring to the attention of this Court a recent decision of Division I of the Court of Appeals, on which the trial court relied (CP 4117). *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006) (applying the public duty doctrine to dismiss a tort action against the City of Kent that sought damages as a result of a malfunctioning fire hydrant). The *Stiefel* court noted that "[t]he fact that the same water supply line serves both fire hydrants and the domestic water system does not convert a fundamentally governmental function [fire hydrants] into a proprietary one." 132 Wn. App. at 530. Seattle

recognizes that *Stiefel*, as well as *Okeson I*, may influence this Court's decision.

Moreover, while remaining sympathetic with Burien's fundamental argument that fire hydrants are a regulatory obligation and cost of a water system, Seattle disagrees with Burien's argument that RCW 80.04.010 and 80.28.010 specifically require SPU or any other water system to supply fire hydrants. Burien's Brief at 8-9. There is nothing in RCW 80.28.010 to indicate that fire hydrants are "fixtures" or otherwise included in the definition of a water system. While the same water supply serves both hydrants and the domestic water system, fire hydrants are not a necessary part of a domestic water supply.[14]

Further, the term "fixtures" that is used in defining "water system" in RCW 80.28.010 is also used in defining "electric plant" in that same section. However, the statute includes neither the term "fire hydrants" nor "streetlights." Implicit in the *Okeson I* decision is that streetlights are not

---

[14] The deposition testimony of Seattle's CR 30(b)(6) witness, Chris Potter, illustrates this point. In answer to a question from the attorney for the City of Shoreline suggesting that SPU gets a "free ride" from suburban cities if SPU charges those cities for hydrants that are used for flushing the water pipes, Mr. Potter responded: "Were the city, were SPU to acquire a device to flush mains instead of a hydrant, that device would look nothing like a fire hydrant. It would not sit three feet above ground, presenting an opportunistic target for every motor vehicle that happened off the road, for example." CP 1611, p. 191:9-14.

"fixtures" of an electric system under in RCW 80.04.010. By extension, fire hydrants are not "fixtures" of a water system.[15]

IV. CONCLUSION

Based on *Okeson I*, Seattle determined that fire hydrant service must be considered a general government function, rather than a proprietary utility function. Seattle accordingly revised its practice of embedding fire hydrant costs in water rates and enacted an ordinance charging general governments for fire hydrants.

If this Court agrees with Burien and Lake Forest Park that *Okeson I* is not applicable to fire hydrants and that fire hydrants are in fact a necessary, regulatory expense of a water system, Seattle will of course return to its prior method of allocating costs through general rates.

But if the trial court's ruling regarding the governmental nature of hydrant service is affirmed, then this Court should also affirm the trial court's ruling that Burien and Lake Forest Park are responsible for paying the costs of hydrants in those cities. Nothing in Washington law prohibits such payment. Moreover, if those cities are relieved of their obligation to pay, then it is SPU – and ultimately its water ratepayers – who will bear

---

[15] Similarly, in RCW 80.28.010(2) and .010(8) the term "facilities" applies to both water systems and electric utilities. Again, neither "fire hydrants" nor "streetlights" are mentioned in those sections of the statute.

the cost of hydrants in those suburban cities. That outcome would be diametrically opposed to the trial court's underlying ruling – based on *Okeson I* – that fire hydrants are a governmental responsibility and expense.

RESPECTFULLY SUBMITTED this 17th day of October, 2007.

THOMAS A. CARR
Seattle City Attorney

By: _____
Gregory C. Narver, WSBA # 18127
Suzanne L. Smith, WSBA #26849
Assistant City Attorneys
Seattle City Attorney's Office
600 – 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

FOSTER PEPPER, PLLC

By: _____
William H. Patton, WSBA # 5771
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
(206) 447-7898